Supreme Court, U.S.
FILED
MAY 31 1994
OFFICE OF THE CLERK

(2)

No. 93-1710

In The

Supreme Court of the United States

October Term, 1993

PHILIP MORRIS INCORPORATED
(d/b/a PHILIP MORRIS U.S.A.),

Petitioner,

v.

CABARRUS COUNTY, NORTH CAROLINA,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of North Carolina

MOTION OF THE INSTITUTE OF PROPERTY TAXATION TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PHILIP MORRIS INCORPORATED'S PETITION FOR WRIT OF CERTIORARI

EDWARD KLIEWER, III
(Counsel of Record)
DALE WILSON

FOSTER, LEWIS, LANGLEY, GARDNER & BANACK, INCORPORATED
112 East Pecan Street,
Suite 1100
San Antonio, Texas 78205
(210) 226-3116

Counsel for Amicus Curiae Institute of Property Taxation

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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22 pp

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Institute of Property Taxation, by and through its counsel of record, Edward Kliewer, III, of Foster, Lewis, Langley, Gardner & Banack, Incorporated moves the Court for permission to file a brief amicus curiae in the above entitled case. This motion is made upon the following statements.

STATEMENT AS TO CONSENT

Petitioner Philip Morris Incorporated has consented in writing to the filing of the subject amicus brief.

Respondent Cabarrus County, North Carolina has declined in writing to consent to the filing of the subject amicus brief.

STATEMENT OF INTEREST OF THE INSTITUTE OF PROPERTY TAXATION

The Institute of Property Taxation is a not-for-profit corporation organized under the laws of the District of Columbia with offices at Suite 1150, 888 Seventeenth Street, N.W., Washington, D.C. 20006. The Institute is a nationwide organization with approximately twenty-eight hundred members who represent a great many large and small business corporations in the United States and other professional organizations and individuals having an interest in (1) fostering and promoting uniform and equitable administration of property taxes and other state and local taxes (but not income taxes), and (2) minimizing the costs of administration and compliance with state and local taxation laws.

The Institute pursues its goals through the promotion of education and professionalism of its members, the collection and exchange of information and assistance among its members, cooperation with governmental bodies and the International Association of Assessing Officers for the purpose of improving state and local tax

administration throughout North America, and the establishment and promotion of high standards of competence and efficiency in tax management.

To enhance the education and professionalism of its members, the Institute presents week-long schools in real and personal property taxation and sales and use taxes, as well as forums, symposiums and conferences. It administers two professional certification programs – the CMI ("Certified Member of the Institute") for property tax professionals and the CSM ("Certified Sales Tax Member") for sales tax professionals. Institute members who seek to obtain these professional designations are required to meet rigorous educational and experience requirements and successfully pass comprehensive written and oral examinations.[1]

The Institute has a strong interest in the fair administration of state and local taxes and the issue in this case – payment of contingent fees by an assessing entity for property tax assessment services – is one of national significance since every state has a local property tax system in one form or another. Moreover, the principles at issue have the potential to extend to other forms of taxation.

Therefore, the Institute has an interest in assuring that whatever the Court's decisions as to the issue before it they are made with full appreciation of the importance of this issue.

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[1] Appended hereto is a statement of the Institute's principles, purposes and its code of ethics.

STATEMENT OF PURPOSE AND SCOPE OF AMICUS BRIEF

It is the opinion of the Institute of Property Taxation that the issue before the Court is one of substantial national importance. The Institute believes that it is well situated to comment upon the national significance of the issue. It is therefore the desire of the Institute to as briefly as possible illustrate the importance of this case. It is the additional desire of the Institute to briefly bring to the Court's attention certain additional authorities and argument relevant to the resolution of the case.

Therefore, the Institute of Property Taxation respectfully requests permission of the Court to submit the enclosed brief in the above-entitled case.

Respectfully submitted,

EDWARD KLIEWER, III
(Counsel of Record)
DALE WILSON
FOSTER, LEWIS, LANGLEY, GARDNER & BANACK, INCORPORATED
112 East Pecan Street,
Suite 1100
San Antonio, Texas 78205
(210) 226-3116
Fax # 226-1065

Counsel for Amicus Curiae
Institute of Property Taxation

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tax professionals and the CSM ("Certified Sales Tax Member") for sales tax professionals. Institute members who seek to obtain these professional designations are required to meet rigorous educational and experience requirements and successfully pass comprehensive written and oral examinations.[1]

The Institute has a strong interest in the fair administration of state and local taxes and the issue in this case – payment of contingent fees by an assessing entity for property tax assessment services – is one of national significance since every state has a local property tax system in one form or another. Moreover, the principles at issue have the potential to extend to other forms of taxation.

Therefore, the Institute has an interest in assuring that whatever the Court's decisions as to the issue before it they are made with full appreciation of the importance of this issue.

STATEMENT AS TO SCOPE OF BRIEF AMICUS CURIAE

The issue before the Court has been thoroughly and ably addressed by Philip Morris Incorporated in its petition for writ of certiorari. It is therefore not the intent of the Institute to discuss applicable case law in detail. Instead, it is the desire of the Institute to as briefly as possible emphasize the importance of this case and to

[1] Appended hereto is a statement of the Institute's principles, purposes and its code of ethics.

also bring to the Court's attention some additional authorities relevant to the case.

SUMMARY OF ARGUMENT

Contingent fee employment by a property tax assessing authority of a private contractor to perform valuation services instrumental to the determination of a tax liability violates the Due Process Clause of the U.S. Constitution. Contingent fee arrangements and the tax assessment process are fundamentally incompatible. That valuation services and contingent fee arrangements are not compatible is well illustrated by the appraisal profession's prohibition of fees that are contingent upon the value concluded and by specific prohibition of such arrangements under the laws of several states.

ARGUMENT

The issue raised by Petitioner Philip Morris Incorporated is of national importance since property taxation occurs at the local level in one form or another in each of the fifty states. Although property taxation exists in each of the states, the systems of administration of the tax vary widely from state to state. However, all property tax schemes have certain elements in common. These common elements include the fact that property taxation involves two fundamental functions: (1) the determination of the tax liability and (2) collection of the tax once it is determined.

Some states permit taxing authorities to employ private parties to collect taxes, particularly delinquent taxes, and to compensate such private collectors on a contingent fee basis. *See, e.g.*, NEB. REV. STAT. §§ 77-377.01 and .02; N.D. CENT. CODE ANN. § 57-22-29; TEX. TAX CODE § 6.30(c) (1994 Supp.). There is no general unfairness involved in the use of contingent fee arrangements in this phase of the property tax process, because this phase merely involves collection of a tax liability that presumably has been lawfully assessed and is due and owing to the taxing authority.

However, the tax assessment function and contingent fee arrangements are fundamentally incompatible. This is true whether the tax assessment in question involves an original determination of a tax liability or whether, as in the case at bar, the assessment involves a redetermination of a tax liability based upon a "tax audit" or "discovery." While the tax collection process is clearly ministerial in nature, the tax assessment process most certainly is not.

Regardless of whether the tax assessment function is characterized as judicial, quasi-judicial, prosecutorial or otherwise, the essential nature of the process is the same. The value of property generally cannot be determined by simple objective compilation and computation but instead requires examination and analysis of a whole host of factors affecting value – age, physical and market conditions, income potential and obsolescence to name just a few. The appraisal of property, therefore, necessarily involves the use of a substantial amount of judgment. When a person exercising such judgment has a personal pecuniary interest in the outcome of the value decision, the process is inherently tainted. As noted by

the Georgia Supreme Court: "Fairness and impartiality are threatened where a private organization has a financial stake in the amount of tax collections as a result of the assessment it recommends." *Sears, Roebuck and Co. v. Parsons, 260 Ga. 824, 401 S.E.2d. 4, 5 (1991).*

In recognition of the sophisticated nature of the appraisal process, the appraisal industry has become one that is heavily regulated both internally, through various accreditation and standards promulgating bodies, and externally, through state licensing requirements. Significantly, the appraisal industry itself considers appraisal fees that are contingent upon value conclusions to be unethical. The Uniform Standards of Professional Appraisal Practice, promulgated by the Appraisal Standards Board of The Appraisal Foundation[2] expressly provides:

> The acceptance of compensation that is contingent upon the reporting of a predetermined value or a direction in value that favors the

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[2] The Appraisal Standards Board of the Appraisal Foundation develops, publishes, interprets and amends the Uniform Standards of Professional Appraisal Practice (USPAP) on behalf of appraisers and users of appraisal services. The USPAP is widely used by state and federal regulatory agencies and others. The USPAP have also been adopted by major appraisal organizations in North America and have become the generally accepted standards of appraisal practice. The ethics provision of the USPAP became effective December 4, 1989. ***Foreword to APPRAISAL STANDARDS BOARD OF THE APPRAISAL INSTITUTE, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE (1993 ed.).*** All members of the Institute of Property Taxation agree to abide by the USPAP pursuant to Rule 18 of the Institute's code of ethics. ***See Appendix.***

> cause of the client, *the amount of the value estimate*, the attainment of a stipulated result, or the occurrence of a subsequent event is unethical.[3]

APPRAISAL STANDARDS BOARD OF THE APPRAISAL FOUNDATION, UNIFORM STANDARDS OF PROFESSIONAL APPRAISAL PRACTICE 2 (1993 ed.) (Emphasis Added).

For similar reasons, at least several states bar the use of contingent fees in the tax assessment process. Texas is one such state. Property taxation in Texas is administered by central appraisal districts generally corresponding to the various counties within the state. ***TEX. TAX CODE ANN. §§ 1.01-43.04 (1994 Supp.)***. The chief administrator of a Texas appraisal district is the "chief appraiser." ***Id.*** Chief appraisers are authorized to employ private firms to provide appraisal services but are expressly prohibited from utilizing contingent fees:

> § 25.01(b) The chief appraiser with the approval of the board of directors of the district may contract with a private appraisal firm to perform appraisal services for the district subject to his approval. A contract for private appraisal services is void if the amount of compensation to be paid the private appraisal firm is contingent on the amount of or increase in appraised, assessed or taxable value of property appraised by the appraisal firm.

TEX. TAX CODE § 22.01(b) (1994 Supp.).

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[3] It is additionally noteworthy that some states, including North Carolina, specifically bar the use of contingent fees for real estate appraisal assignments. *See N.C. GEN. STAT. § 93A-80(a)(3) (Cum. Supp. 1993).*

As the Petitioner has noted, Georgia is another state which has prohibited the use of contingent fee arrangements, in this instance by decision of the supreme court of the state. *Sears, Roebuck and Co. v. Parsons, 260 Ga. 824, 401 S.E.2d 4 (1991).*

The property tax schemes throughout the country are varied and multitudinous. Similarly, the number of different forms which contingent contracts of the type in question might take are beyond calculation. In the instant case, there are certain circumstances involving both the tax scheme and the particular contract in question which make the additional tax imposed upon Petitioner especially offensive. Chief among these circumstances are:

> (1) once the notice of proposed adjustment was issued the private firm was entitled to significant compensation whether or not the additional tax was ultimately upheld. The taxing authority therefore had an incentive to uphold the tax assessment in order to have funds to pay the private firm;
>
> (2) the private firm apparently had discretion in the selection of the subjects of its audit, discretion which one could reasonably expect to be exercised in a fashion that would likely generate the largest fees (i.e., inequitable targeting of large taxpayers); and
>
> (3) under North Carolina law, tax assessments bear a presumption of correctness. Even erroneous valuations will be upheld unless (a) they are either "illegal" or "arbitrary" and (b) the error is substantial. *See, e.g., Appeal of Amp Incorporated, 287 N.C. 547, 562-63, 215 S.E.2d 752, 761-62 (1975),* and cases cited therein.

Although the particular circumstances of this case make the contingent fee arrangement in question especially offensive, it is the earnest opinion of the Institute that contingent fees are inherently so incompatible with the appraisal/assessment process as to violate due process, regardless of the particularities of the taxation system or contingent fee contract in question.

Taxation is one of the heaviest burdens a government by necessity imposes upon its citizenry. It is therefore of the utmost importance that such burden be administered fairly and objectively. Such fairness and objectivity can never be achieved when a party that is instrumental to the determination of a tax liability has a pecuniary interest in such determination.

CONCLUSION

For all the foregoing reasons, Amicus Curiae the Institute of Property Taxation wholeheartedly endorses the position and arguments of Petitioner and urges that its petition for writ of certiorari be granted.

Respectfully submitted,

EDWARD KLIEWER, III
(Counsel of Record)
DALE WILSON
FOSTER, LEWIS, LANGLEY, GARDNER
& BANACK, INCORPORATED
112 East Pecan Street, Suite 1100
San Antonio, Texas 78205
(210) 226-3116

Counsel for Amicus Curiae
Institute of Property Taxation

APPENDIX

THE INSTITUTE OF PROPERTY TAXATION – STATEMENT OF PRINCIPLES, PURPOSES AND CODE OF ETHICS

The Institute of Property Taxation is a non-profit nationwide organization which exists to promote ethical and professional standards of conduct among its members and to administer formal educational programs related to state and local ad valorem, sales and use taxes.

The Institute has a written code of ethics and standards of professional practice, whereby each member agrees to be governed by objective and professional standards consistent with sound administration of property and state and local tax laws and the adoption of tax legislation, with due regard for the interests of society as well as those of the member company. The following are the Institute's Statements of Principles and Purposes and the Code of Ethics.

PRINCIPLES

The Institute of Property Taxation is dedicated to fostering the professionalization of its members, to promoting the uniform and equitable administration of ad valorem taxation and all other forms of state and local taxation (other than income taxation) and to minimizing the costs of administration and compliance.

PURPOSES

In furtherance of the above principles, the Institute of Property Taxation is formed for the following purposes:

1. To foster the education and professionalization of its members and to provide its membership with the information and services necessary to effectively carry out their responsibilities in ad valorem and all other forms of state and local taxation (other than income taxation).

2. To preserve and promote the use of equitable and non-discriminatory methods in taxation of business enterprises carrying on diversified activities in taxing jurisdictions.

3. To eliminate inequitable and discriminatory distortion or otherwise illegitimate methods of determining tax liabilities.

4. To collect, analyze and disseminate information with respect to existing and proposed legislation, regulations and administrative action which is pertinent to the purposes of the Institute; encourage the free discussion of such subjects; present the views of the Institute to other taxpayer organizations, governmental bodies and other interested persons; and take such other actions as are deemed appropriate to the accomplishment of its purposes.

5. To develop and operate a program for the education of its members and to promote the study of property taxation and other forms of state and local taxation (other than income taxation) by encouraging research and by conducting conferences and symposiums on tax matters.

These principles and purposes of the Institute of Property Taxation can be achieved only by the observance of the highest standards of ethical and professional conduct by its members. To insure the observance of these

high standards, the Board of Governors has adopted the following code of ethics.

CODE OF ETHICS
STANDARDS OF PROFESSIONAL CONDUCT

The Institute of Property Taxation has established this Code of Ethics and Standards of Professional Conduct to set forth ethical and professional guidelines for all IPT members in the administration of property and sales and use taxes.

Each member of IPT agrees to subscribe to this Code of Ethics and Standards of Professional Conduct and to report to the IPT Committee on Professional Ethics any unethical practices or actions by any IPT member.

1. IT IS UNETHICAL to engage in any conduct that discredits IPT, or the tax profession.

2. IT IS UNETHICAL to engage in any activity that results in a conviction of any crime that involves the tax profession.

3. IT IS UNETHICAL to operate beyond the boundaries of an agreed relationship with an employer or a client.

4. IT IS UNETHICAL to infer or imply that you represent a person or firm you do not represent, or to file any document on behalf of a taxpayer without specific authorization of the taxpayer.

5. IT IS UNETHICAL to violate the confidential nature of the employee-employer or the consultant-client relationship, except as required by law.

6. IT IS UNETHICAL to offer or accept anything of value with the intent of inducing a specific action.

7. IT IS UNETHICAL to offer or accept anything of value as a share of a fee for an assignment in which you did not participate.

8. IT IS UNETHICAL to assign, accept or perform a tax assignment that is contingent upon producing a predetermined analysis or conclusion.

9. IT IS UNETHICAL to file or proceed with any appeal in which there is known to be no basis in fact. The determination of whether a basis in fact exists must be made as soon as reasonably possible.

10. IT IS UNETHICAL in the performance of a tax assignment to issue an appraisal, analysis or opinion that fails to disclose bias or the accommodation of a personal interest.

11. IT IS UNETHICAL in the performance of a tax assignment to willfully furnish inaccurate, deceitful, or misleading information, or to willfully conceal material information.

12. IT IS UNETHICAL to prepare or use in any manner a resume or statement of professional qualifications that is misleading or false.

13. IT IS UNETHICAL in promoting a tax practice and soliciting assignments to utilize misleading or false advertising.

14. IT IS UNETHICAL in promoting a tax practice and soliciting assignments to make a direct reference to superiority over an individual competitor.

15. IT IS UNETHICAL to solicit any tax assignment by assuring a specific result or by stating a conclusion regarding that assignment without prior analysis of the facts and circumstances pertaining thereto.

16. IT IS UNETHICAL to use client listings or references without specific authorization.

17. IT IS UNETHICAL to make any solicitation implying IPT authorization, endorsement or approval of any product or service.

18. IT IS UNETHICAL in the performance of an independent fee appraisal to violate any part of the "Uniform Standards of Professional Appraisal Practice" issued by The Appraisal Foundation.

Adopted by Board of Governors, April 28, 1991.